84-698 (1)

No. _____

Office - Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

JOSEPH M. SAIZAN,

Petitioner,

v.

RAYMOND DONOVAN, as Secretary of Labor of the United States of America, DONALD CARMEN, as Administrator of General Services Administration, ESRA POSTON, HERBERT ELLINGWOOD, and RONALD WERTHIM, as the Merit Systems Protection Board, CULLEN P. KEOUGH, DONALD H. WILLIAMS, and CHARLES H. SMITH, Respondents

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Petition for a Writ of Certiorari to the United Court of Appeals for the Fifth Circuit

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Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3672
Summary Calendar

JOSEPH M. SIAZAN,

Plaintiff-Appellant,

versus

RAYMOND DONOVAN, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

(June 13, 1984)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge*:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to this Rule, the court has determined that this opinion should not be published.

This is an appeal from a summary judgment dismissing appellant's suit against the Secretary of Labor of the United States and various other federal government officials for alleged violations of his constitutional rights in the course of his employment with the United States Department of Labor. Although appellant had previously brought suit alleging the same causes of action, which suit was dismissed on the basis of a consent judgment, appellant now argues that he had agreed to the judgment because of defendants' duress. We are called upon to determine whether the provisions of Rule 60(b), Fed.R.Civ. P. provide any basis for relieving appellant of the res judicata effect of the prior consent judgment. Because we find that appellant has failed to demonstrate under Rule 60(b) any basis for relief, we affirm the judgment of the district court.

I.

Facts

The facts, as agreed upon by the parties, are as follows. Prior to April 22, 1979, appel-

lant Joseph M. Saizan was a supervisory compliance specialist, GS-13, in the New Orleans area office of the United States Department of Labor, Labor Management Services Administration (LMSA). On May 26, 1978, appellee Williams, Area Administrator for LMSA, issued a letter to Saizan advising him that his performance for the year ending April 20, 1978, fell below acceptable standards for his retention. Williams further set forth a number of specific work assignments in which Saizan's performance had been deficient and warned him that unless his performance improved within ninety days from the date of the letter, Williams would recommend that Saizan not be retained in his position. On October 31, 1978, Williams issued a letter to Saizan proposing that Saizan be removed from his position as Supervisory Labor - Management Complaince Specialist and be separated from the federal service. On March 2, 1979, appellee Keough, Regional Administrator for LMSA in Kansas City, Missouri, issued a decision finding that the reasons and psecifications set forth in William's

October 31. 1978 letter were fully supported by the evidence. Keough's decision was that Saizan be demoted to the position of Labor - Management Compliance Specialist, GS-12, and that Saizan be transferred to the St. Louis, Missouri, area office of the LMSA, effective on April 22, 1979.

Saizan subsequently filed an appeal of his demotion and transfer with the Merit Systems Protection Board (MSPB). He alleged in his appeal to the MSPB that he had been discriminated against on the basis of race and age and based on reprisal for his having testified in connection with another employee's EEO complaint.[1] Pursuant to the procedures then in effect, the MSPB gave Saizan the option of combining his EEO complaint with his appeal and Saizan selected this option. Hearings were held before the MSPB in New Orleans on November 15 and 16, and December 5, 6, and 7, 1979.

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[1]Saizan in his brief in this Court expressly states that "plaintiff in the instant action does not allege racial discrimination."

In May of 1979, Saizan filed two lawsuits against appellees in the United States District Court for the Eastern District of Louisiana. The suits were consolidated in June 1979. After the conclusion of the MSPB hearing and prior to the issuance of an MSPB decision, Saizan and appellees, in late February 1980, entered into a Joint Motion for Order of Judgment by Consent in the consolidated cases, and in March 1908 an Order of Judgment was signed by the district court and entered in the records of the consolidated cases which "Ordered, Adjudged And Decreed that" the consolidated suits "are dismissed with prejudice" and that plaintiff "shall (w)hithdraw with prejudice" all his pending administrative appeals, grievances, complaints, and Freedom of Information requests, including the MSPB appeal, and file no further complaints, grievances, or appeals concerning events prior to the consent judgment. Saizan was represented by counsel in the two suits filed in 1979 and his counsel approved the 1980 consent judgment. Saizan personally also approved the 1980 consent

judgment.

On February 18, 1982, Saizan filed the present complaint, alleging the same causes of action as in his 1979 complaints. He subsequently amended his complaint to allege a violation of the Freedom of Information Act.[2] On June 30, 1983, appellees filed Motions for Summary Judgment and Dismissal which were heard before the district court on September 21, 1983. Saizan presented no affidavits or other evidentiary material in opposition to the Motion for Summary Judgment. On September 23, 1983 the district court granted appellees' Motion for Summary Judgment, denied the Motion to Dismiss, and

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[2]Although Saizan thereafter moved to supplement his complaint with allegations that the Labor Department had violated the Privacy Act, this motion was not ruled on prior to the district court's granting of the Motion for Summary Judgment. Saizan does not appeal the district court's denial of his Motion to Supplement his complaint, and we, therefore, are presented only with the appropriateness of the district court's denial of relief under Rule 60(b), Fed.R.Civ.P.

ntered judgment on October 4, 1983 against aizan. Saizan was represented below, and is epresented on this appeal, by the same counsel ho represented him in the suits commenced in 979 and who approved the 1980 consent judgment ismissing those suits with prejudice.

II.

Rule 60(b)

Federal Rule of Civil Procedure 60(b) numerates several situations in which a court ay relieve a party from a final judgment.[3]

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[3] Federal Rule of Procedure 60(b) provides:

(b) Mistakes; Inadvertance; Excusable eglect; Newly Discovered Evidence; Fraud, etc. n motion and upon such terms as are just, the ourt may relieve a party or his legal represen- ative from a final judgment, order, or proceed- ng for the follwong reasons: (1) mistake, in- dvertance, surprise, or excusable neglect; (2) ewly discovered evidence which by due diligence ould not have been discovered in time to move or a new trial under Rule 59(b); (3) fraud whether heretofore denominated intrinsic or xtrinsic), misrepresentation, or other miscon- uct of an adverse party; (4) the judgment is iod; (5) the judgment has been satisfied, re- eased, or discharged, or a prior judgment upon hich it is based has been reversed or otherwise acated, or it is no longer equitable that the udgment should have prospective application;

(Footnote Continued.)

The record below and the briefs submitted to this Court do not clearly set forth which provisions of Rule 60(b) Saizan is attempting to apply to the facts of this case. The district court's minute entry granting appellee's Motion for Summary Judgment found that Rule 60(b)(3) and (6) did not provide Saizan a basis for relief. On appeal, Saizan seems to focus on the applicability of Rule 60(b)(5) and the provision that the rule "does not limit the power of a court to entertain an independent action to re-

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[3] (Continued.)
(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2). and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

lieve a party from a judgment . . . or to grant relief to a defendant not actually personally notified . . . or to set aside a judgment for fraud upon the court."[4] Agreeing with the district court that Saizan has failed to satisfy the one year time limitation announced in Rule 60(b)(3), we therefore consider the applicabilty of (b)(5), (6), and the "independent action" provision, recognizing that motions under Rule 60(b) are directed to the sound discretion of the trial court and that the denial of relief under the Rule will be set aside on appeal only for abuse of that discretion. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

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[4]Saizan also appears to argue in the alternative that the limitations of Rule 60(b) should not apply at all to this case because of a consent judgment is not a judgment within the terms of the Rule. This agrument is clearly erroneous, however. Although a consent judgment is construed like a contract for enforcement purposes, it is, nevertheless, a judgment. See Strouse v. J. Kinson cook, Inc., 634 F.2d 883 (5th Cir. 1981) (per curiam). See also: Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1340 9th Cir. 1981):

"(W)e follow the mandate of United States v. Swift & Co., 286 U.S. 106, 115, 52 S.

(Footnote Continued.)

Rule 60(b)(5) provides for relief from a judgment where "it is no longer equitable that the judgment should have prospective application." But this language from 60(b)(5) is intended to apply to judgments that have a prospective effect rather than those that offer a present remedy for a past wrong. Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980) (citing Wright & Miller, Federal Practice and Procedure: Civil §2863 at 205); McDonald v. Oliver, 642 F.2d 169, 171 (5th Cir. 1981)(same). Moreover, "[i]t [Rule 60(b)(5)] does not allow relitigation of issues that have been resolved by the judgment. Instead it refers to some change in conditions that makes continued enforcement inequitable." Wright & Miller, Federal Practice and Procedure: Civil §2863 at 206-07 (footnote omitted).

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[4](Footnote Continued.) Ct. 460, 462, 76 L.Ed. 999 (1932), by 'reject[ing] the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act.' Relief from any provision of the original judgment thus must be considered under Rule 60 of the Federal Rules of Civil Procedure rather than under a contract law analysis."

Although portions of the consent judgment have prospective application,[5] Saizan suggests

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[5]According to the terms of the consent judgment, Ray Marshall, as Secretary of Labor of the United States, was ordered to (1) transfer Saizan from the LMSA St. Louis area office, to the LMSA Dallas area office as soon as Saizan had completed the cases currently assigned to him, (2) grant Saizan a pay increase to GS-12, Step 10, effective on the date of the consent judgment, (3) assure Saizan that he would not be subjected to reprisal, retaliation, discriminatory or disparate treatment of any kind because of the events giving rise to the lawsuit or because of any administrative or civil actions pursued by Saizan in connection with the events giving rise to the lawsuits, (4) assure Saizan that between the date of the consent judgment and June, 1982, no decision to demote him, transfer him involuntarily, or remove him from federal service would be made without the concurrence of the Regional Administrator of the Kansas City Region of LMSA or his successor, (5) assure Saizan that a performance evaluation would be prepared by his present supervisors in the St. Louis area office prior to his transfer to the Dallas area office, and that the next evaluation of his performance would be due one year following the date of the performance evaluation prepared by the St. Louis area office and would be prepared by the person who was then his immediate supervisor, and (6) assure Saizan that his change in duty station from St. Louis to Dallas would be at the expense of the Department of Labor. According to the terms of the consent judgment, Saizan was required to (1) withdraw with prejudice all pending administrative complaints and/or appeals, grievancess, freedom of information requests and/or appeals which had been filed by him with the U.S. Department of Labor, Merit Systems Protection Board, or any other agency; (2) not

(Foctnote Continued.)

o changed circumstances tha would make further rospective application of the consent judgment nequitable. Although he attempts to couch his rguments in terms of his having been compelled o agree to the consent judgment out of duress, he duress of which he complains is essentially othing other than the various acts that formed he basis for his original lawsuits.[6] Saizan hus attempts merely to relitigate the issues ettled by the consent judgment, and therefore,

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[5](Footnote Continued.) file any further omplaints, grievances, and/or appeals with the dministrative agencies regarding events which ccurred prior to the date of the consent judgent; and (3) relase the Department of Labor, ts officials and employees, and the individuals amed as defendants from any and all claims hatsoever arising out of the events forming he basis of these lawsuits.

[6]Thus, Saizan calls attention in his brief o the allegations in his complaint concerning is demotion which occurred prior to the 1979 uit; "Defendant representatives of the Departent of Labor subjected Plaintiff to prolonged hysical, mental, intellectual, and emotion uress prior to demoting him to a level lower han the limits prescribed by applicable regulations . . . thereby further subjecting him to duress of goods' and then subjecting him to a rohibited interstation transfer."

Indeed, in his brief Saizan, after summaizing his allegations of duress in the present uit, states in reference thereto: "Essentially,

(Footnote Continued.)

fails to fall within the provisions of 60(b)(5).

Rule 60(b)(6) provides for relief from a judgment for "any other reason justifying relief from the operation of the judgment." Nevertheless, this provision applies only to cases "of extraordinary circumstances." See: Ackermann v. United States, 340 U.S. 193, 199 (1950); Gray v. Estelle, 574 F.2d 209, 215 (5th Cir. 1978). It is "generally reserved for situations showing compelling or aggravated circumstances involving extreme hardship and injustice." McDonald v. Oliver, 642 F.2d 169, 172 (5th Cir. 1981). Moreover, subsection (6) is not available to a party where relief would have been available under subsections (1) through (5) if the party had sought that relief within the proper time limits. See: United States v. 119.67 Acres of Land, 663 F.2d 1328, 1331 (5th Cir. 1981); Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 836 n. 8 (5th Cir. 1980);

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[6](Footnote Continued.) all of these matters are included in one way or another in the [1979[civil actions dismissed as a result of the compromise settlement, clearly ruling out deception as an element." (emphasis added)

William Skillings & Associates v. Cunard Transportation, Ltd., 594 F.2d 1078, 1081 (5th Cir. 1979) (per curiam); Gulf Coast building and Supply Co., Inc. v. International Brotherhood of Electrical Workers, Local No. 480, 460 F.2d 105, 108 (5th Cir. 1972). In the present case, Saizan contends that various fraudulent acts of appellees praced him in a position in which he was compelled to acquiesce to the consent judgment out of duress. It is clear, therefore, that Saizan's justification for obtaining relief from the prior judgment would have fallen within the provisions of Rule 60(b)(3) pertaining to fraud, misrepresentation, or other misconduct of an adverse party. He seeks to use subsection (6) merely as an escape from his failure to seek relief within the one year required by subsection (3), and his attempt to do so must fail. Even if it did not, we do not believe that the district court abused its discretion in determining that Saizan had not shown such compelling or aggravating circumstances as to justify relief under this subsection. Moreover, Saizan

presents no adequate explanation of his nearly two year delay in seeking relief.[7]

Finally, Saizan attempts to bring his case within the provisions of Rule 60(b) that allows relief from a judgment based on the power of a court "to entertain an independent action to relieve a party from a judgment . . . or to grant relief to a defendant not actually personally notified . . . or to set aside a judgment for fraud upon the court." Only the "relieve a party from judgment" clause has possible application to the present case. Although Saizan has alleged that appellees have engaged in various fraudulent practices, only the most egregious misconduct constitutes fraud on the court -- bribery of a judge or member of a jury, or fabrication of evidence in which an attorney is implicated, for example. Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978)

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[7]In his brief Saizan expressly disclaims any contention that he was ever misled or deceived into signing the consent judgment. See last sentence of note 6, supra. At still another place in his brief he says: "[i]t is

(Footnote Continued.)

(quoting United States v. International Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D. Conn. 1972), aff'd without opinion sub nom. Nader v. United States, 410 U.S. 919 (1973)). See also Kerwit Medical Products, Inc. v. N.&H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). Nothing remotely approaching "fraud on the court" or anything comparable thereto is alleged here. Indeed, in his brief Saizan expressly disclaims any assertion of fraud.[8]

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[7](Footnote Continued.)almost impossible to envision anything more incongruous, tending to the absurd, for the plaintiff to try to convince a court that plaintiff had been misled or deceived by defendants or anyone else. . . ." In his supplemental brief Saizan continues in the same vein stating that "[f]or him to allege that he did not know [at the time of the consent judgment] that defendants were in bad faith [in their demotion and transfer of him and failure to rectify these matters] would be ludicrous."

[8]He states in his brief "[e]xaming plaintiff's petition, it can readily be seen that in each instance that fraud is alleged it is used in the sense of duress. Duress and/or stress . . . is the principal thrust of petitioner's complaint." He also argues that since he was not claiming to have been deceived and was not deceived, he accordingly was not claiming fraud. See also notes 6 and 7, supra.

"Resort to an independent action may be had only rarely, and then under unusaul and exceptional circumstances." Wright & Miller, Federal Practice and Procedure; Civil §2868 at 239 (footnote omitted). See also Rader v. Cliburn, 476 F.2d 182, 184 (6th Cir. 1973)(per curiam). Moreover, in a case involving a consent judgment, the burden under Rule 60(b) is perhaps even more formidable. See Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114, 1120 (3rd Cir. 1979), cert. denied, 444 U. S. 1026 (1980). Cf. Ackermann v. United States, 340 U.S. 193, 198 (1950) ("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.") (applied to decision not to appeal); Good Luck Nursing Home, Inc. v. Harris, 636 F. 2d 572, 577 (C.C. Cir. 1980) ("Rule 60(b) cannot, therefore, be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.") (applied to the decision to stipulate certain facts). Saizan has in no sense come forward with the pracitically conslu-

sive evidence on the basis of which relief was granted in Ferrell v. Trailmobile, Inc., 223 F. 2d 697 (5th Cir. 1955), and Johnson Waste Materials v. Marshall, 611 F.2d 593 (5th Cir. 1980). Further, the essence of what he now asserts as a basis to upset the consent judgment was known to him at and before its entry, and indeed these complaints were in substance part of those that the consent judgment purported to settle and dispose of. In this context we cannot find that Saizan has presented such unusual, exceptional, and egregious circumstances as would justify upsetting the terms of the consent judgment to which he agreed. We therefore affirm the decision of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-3672

JOSEPH M. SAIZAN,

Plaintiff-Appellant,

versus

RAYMOND DONOVAN, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(July 11, 1984)

Before GARWOOD, HIGGINBOTHAM and DAVIS,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and same is hereby denied.

ENTERED FOR THE COURT:

(Signed) W. H. Garwood
United States Circuit Judge

7/9/84

APPENDIX C

MINUTE ENTRY
BEER, J.
SEPTEMBER 23, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSPEH M. SAIZAN	CIVIL ACTION
VERSUS	NUMBER 82-618
RAYMOND DONOVAN, ETC., ET ALS	SECTION M

Defendants' motion to dismiss is denied for the reasons orally assigned at the time that this matter was argued.

Defendants' motion for summary judgment is granted. I have considered the opposition to the motion filed by counsel for the plaintiff, as well as the original pleadings. It seems to me that the time limitations announced in Rule 60(b)(3) apply in view of the fact that plaintiff has failed, as far as I can see, to set out any valid contention regarding "fraud, misrepresentation or other misconduct...." By the same token, I find no reason to impose the provisions of Rule 60(b)(6). The Labor Department's very detailed brief has, additionally, been supplemented by a letter calling my attention to the recent opinion of the United States

Supreme Court in Bush v. Lucas, Number 81-469, decided on June 13, 1983, which, in my view, reenforces the conclusions noted above.

The U.S. Attorney is directed to prepare a judgment consistent with this minute entry.

COUNSEL OF RECORD

DATE OF ENTRY SEP 26 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH M. SAIZAN	*	CIVIL ACTION NO. 82-618
Plaintiff	*	SECTION: "M"(5)
versus	*	
RAYMOND DONOVAN, ET AL.	*	
Defendants.	*	
	*	

JUDGMENT

The motion for summary judgment on behalf of the defendants was heard on oral argument on September 21, 1983.

PRESENT: W. Glenn Burns, Attorney for Defendants Raymond Donovan, Secretary of Labor, et al

Leon Rudloff, Attorney for Plaintiff, Joseph M. Saizan

After considering the peladings, memorandum of law, and the argument of counsel, for reasons assigned by minute entry, dated September 26, 1983, and considering the direction of the Court as to the entry of judgment.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment on behalf of the defendants, Raymond Donovan, et al. be it hereby is GRANTED and that there be in judgment in

favor of the defendants Raymond Donovan, et al. and against the plaintiff Joseph M. Saizan dismissing the suit with prejudice, each party to bear its own cost.

Dated at New Orleans, Louisiana, this 3rd day of Obtober, 1983.

/Signed/ Peter Beer
PETER BEER
UNITED STATES DISTRICT JUDGE